

JUDICIAL PROCEDURE

Protocol signed at Madrid January 12, 1877

Entered into force January 12, 1877

*Terminated April 14, 1903, by treaty of July 3, 1902*¹

Treaty Series 331

PROTOCOL OF A CONFERENCE HELD AT MADRID, ON THE 12TH OF JANUARY, 1877, BETWEEN THE HONORABLE CALEB CUSHING, MINISTER PLENI-POTENTIARY OF THE UNITED STATES OF AMERICA, AND HIS EXCEL-LENCY SEÑOR DON FERNANDO CALDERON Y COLLANTES, MINISTER OF STATE OF HIS MAJESTY THE KING OF SPAIN

The respective parties, mutually desiring to terminate amicably all controversy as to the effect of existing treaties in certain matters of judicial procedure, and for the reasons set forth and representations exchanged in various notes and previous conferences, proceeded to make declaration on both sides as to the understanding of the two Governments in the premises, and respecting the true application of said treaties.

Señor Calderon y Collantes declared as follows:

1. No citizen of the United States residing in Spain, her adjacent islands, or her ultramarine possessions, charged with acts of sedition, treason or conspiracy against the institutions, the public security, the integrity of the territory or against the Supreme Government, or any other crime whatsoever, shall be subject to trial by any exceptional tribunal, but exclusively by the ordinary jurisdiction, except in the case of being captured with arms in hand.

2. Those who, not coming within this last case, may be arrested or imprisoned, shall be deemed to have been so arrested or imprisoned by order of the civil authority for the effects of the Law of April 17, 1821, even though the arrest or imprisonment shall have been effected by armed force.

3. Those who may be taken with arms in hand, and who are therefore comprehended in the exception of the first article, shall be tried by ordinary council of war, in conformity with the second article of the hereinbefore-mentioned law; but even in this case the accused shall enjoy for their defense the guarantees embodied in the aforesaid Law of April 17, 1821.

¹ TS 422, *post*, p. 628.

4. In consequence whereof, as well in the cases mentioned in the third paragraph as in those of the second, the parties accused are allowed to name attorneys and advocates, who shall have access to them at suitable times; they shall be furnished in due season with copy of the accusation and a list of witnesses for the prosecution, which latter shall be examined before the presumed criminal, his attorney and advocate, in conformity with the provisions of articles twenty to thirty-one of the said law; they shall have right to compel the witnesses of whom they desire to avail themselves to appear and give testimony or to do it by means of depositions; they shall present such evidence as they may judge proper; and they shall be permitted to be present and to make their defense, in public trial, orally or in writing, by themselves or by means of their counsel.

5. The sentence pronounced shall be referred to the *audiencia* of the judicial district, or to the Captain General, according as the trial may have taken place before the ordinary judge or before the council of war, in conformity also with what is prescribed in the above-mentioned law.

Mr. Cushing declared as follows:

1. The Constitution of the United States provides that the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where said crimes shall have been committed, or when not committed within any State the trial will proceed in such place as Congress may direct (Art. III, § 2);² that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment of a grand jury except in cases arising in the land and naval forces or in the militia when in actual service (Amendments to the Constitution, Art. V); and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have counsel for his defense. (Amendments to the Constitution, Art. VI.)

2. The Act of Congress of April 30, 1790, chap. 9, sec. 29,³ re-enacted in the Revised Statutes, provides that every person accused of treason shall have a copy of the indictment and a list of the jury, and of the witnesses to be produced at the trial, delivered to him three days before the same, and in all other capital cases two days before that takes place; that in all such cases the accused shall be allowed to make his full defense by counsel learned in the law, who shall have free access to him at all seasonable hours; that he shall

² 1 Stat. 18.

³ 1 Stat. 118.

be allowed in his defense to make any proof which he can produce by lawful witnesses, and he shall have due power to compel his witnesses to appear in court.

3. All these provisions of the Constitution and of Acts of Congress are of constant and permanent force, except on occasion of the temporary suspension of the writ of habeas corpus.

4. The provisions herein set forth apply in terms to all persons accused of the commission of treason or other capital crimes in the United States, and therefore, as well by the letter of the law as in virtue of existing treaties, the said provisions extend to and comprehend all Spaniards residing or being in the United States.

Señor Calderon y Collantes then declared as follows:

In view of the satisfactory adjustment of this question in a manner so proper for the preservation of the friendly relations between the respective Governments, and in order to afford the Government of the United States the completest security of the sincerity and good faith of His Majesty's Government in the premises, command will be given by Royal Order for the strict observance of the terms of the present Protocol in all the dominions of Spain and specifically in the Island of Cuba.

In testimony of which we have interchangeably signed this Protocol.

CALEB CUSHING

FERNDO. CALDERON Y COLLANTES